

Case Summary

Robert T. Ellis, Jr., appeals the trial court's decision granting custody of his daughter, E.E., to his ex-wife, Jennie Ellis (now Jennie Murray). Finding that the evidence is sufficient to support the trial court's determination that it is in E.E.'s best interests that she remain in the custody of her mother, we affirm.

Facts and Procedural History¹

Robert and Jennie were married July 1, 2000, and separated on August 26, 2003. One daughter, E.E., was born of the marriage on May 6, 2003. E.E. remained with Jennie during the pendency of the divorce, but both parties sought sole physical custody of E.E. The trial court appointed Dr. Susan Spencer, a licensed psychologist, to perform a custody evaluation. Dr. Spencer met once each with both parents and once with E.E. in each parent's presence; she met with Robert and E.E. when E.E. was six months old, and she met with Jennie and E.E. when the child was sixteen months old. She also conducted various testing profiles to assess each parent's suitability as a caregiver. In her report, Dr. Spencer points out that the infrequency and conditions of her meetings with each parent over such a period of time "is not conducive to comparing their parenting." Appellant's App. p. 20. Noting that limitation both in her report and in her testimony at the final

¹ We feel compelled to comment on Robert's portrayal of the facts in this case. Indiana Appellate Rule 46(A)(6) requires the following regarding a party's statement of facts:

Statement of Facts. This statement shall describe the facts *relevant to the issues presented for review* but need not repeat what is in the statement of the case.

(Emphasis added.) Robert's statement of facts fails entirely to cite any of the considerable evidence supporting the trial court's award of custody to Jennie. While we recognize an attorney's role as advocate for his client, the appellate rules do not promote a one-sided, misleading representation which cites only those facts favorable to a party's position. We remind attorneys of their responsibility to present, with considerable candor, all facts relevant to this Court's review on appeal.

custody hearing, Dr. Spencer went on to present the results of her evaluation and recommended that the parents share custody of E.E., with primary physical custody granted to Robert. *Id.* at 30; Tr. p. 33-34.

Various portions of Dr. Spencer's report and her testimony demonstrate her reasoning for her conclusion. Among other things, she indicated that she was concerned by the fact that Jennie was evasive and even dishonest at times during Dr. Spencer's evaluations. Appellant's App. p. 29; Tr. p. 25. She was concerned with the fact that Jennie is in her mid-thirties but has not completed her education, did not have a steady job, and in Dr. Spencer's opinion had left her marriage without first ensuring an adequate plan for her and E.E. to live apart from Robert. Appellant's App. p. 29; Tr. p. 44. She also indicated that she was concerned with the fact that Jennie smoked possibly throughout her pregnancy and admittedly following her pregnancy, Appellant's App. p. 23-24; Tr. p. 9-10, 48, and with Robert's report that he has had to drop E.E. off with a number of different caretakers when returning her from visitation, Appellant's App. p. 28-29.

Other witnesses also presented testimony at the custody hearing that, according to Robert, called Jennie's appropriateness as a parent into question. Several witnesses reported that Jennie smoked in E.E.'s presence and while both pregnant and breastfeeding, and Jennie admits these allegations herself. Tr. p. 73, 91, 149, 208, 218, 234. Testimony was also admitted indicating that Jennie had denied Robert visitation with E.E. on numerous occasions, and Jennie admitted this was true, as well. *Id.* at 121-23, 177, 235, 261-63. It was established that on the day E.E. came home from the

hospital after her birth, Jennie left the home for approximately six hours even though she had been breastfeeding the child in the hospital and continued to do so at home. *Id.* at 47, 72-73, 130-31, 190. Finally, several witnesses testified that Jennie had allowed E.E. to develop “severe” diaper rashes, failed to bathe her regularly, and allowed her to remain in soiled clothing for long periods. *Id.* at 97-98, 206-07, 215, 225, 238-39, 242.

Other witnesses testified, however, in direct contrast to many of these assertions. Elizabeth Arnett, a certified lactation counselor who took the place of Amy Sells, the counselor who advised Jennie during her breastfeeding, testified that she would advise a smoking mother to continue to breastfeed her child because the benefits of breastfeeding outweigh the detriments of smoking while breastfeeding. *Id.* at 105-06, 107-08. Testimony was admitted suggesting that on the day Jennie and the baby returned home from the hospital, Robert had invited guests over against Jennie’s wishes and then refused to allow Jennie to breastfeed, and Jennie had left that evening in an attempt to defuse the conflict between the couple. *Id.* at 47, 72-73, 131, 190-91, 274. Evidence was admitted suggesting that Robert had been difficult with Jennie regarding visitation and that this led to many of the denied visits and problems with exchanging E.E., *id.* at 35-37, 79-80, 121, 123, 137-38, 156, and even Robert admitted that these problems had been rectified and that visitation had gone smoothly over the past year, *id.* at 264-65. Several witnesses who had frequent contact with Jennie and E.E. also testified that Jennie was a very attentive, capable mother who kept a neat home, bathed and changed her daughter regularly, and never allowed the baby to develop a severe diaper rash. *Id.* at 54-56, 78-79, 98-101, 111-14, 129, 134-36, 168-70, 280-87.

The trial court issued a Decree of Divorce on November 7, 2005, awarding Jennie sole physical custody of E.E. and granting Robert parenting time pursuant to the Indiana Parenting Time Guidelines. *See* Appellant’s App. p. 12. Robert filed a motion to correct error on custody and other issues, and that motion was granted in part but denied as to child custody. Robert now appeals the trial court’s award of custody to Jennie.

Discussion and Decision

Robert raises one issue on appeal, which we rephrase as whether the evidence is sufficient to support the trial court’s decision to award sole custody of E.E. to Jennie. “Child custody determinations fall squarely within the discretion of the trial court and will not be disturbed except for an abuse of discretion.” *Klotz v. Klotz*, 747 N.E.2d 1187, 1189 (Ind. Ct. App. 2001). We will not reverse unless the trial court’s decision is clearly erroneous and against the logic and effect of the facts and circumstances before it or the reasonable inferences drawn therefrom. *Nunn v. Nunn*, 791 N.E.2d 779, 782 (Ind. Ct. App. 2003). We consider only the evidence favorable to the judgment and all reasonable inferences drawn from that evidence. *Id.* Trial courts view the parties, observe their conduct and demeanor, and hear their testimony; therefore, their decisions receive considerable deference on appeal, and we will not reweigh the evidence or reassess the credibility of witnesses. *Id.* at 783, 787. We also note that Robert is appealing from a negative judgment; hence, he must show that “the evidence points unerringly to a conclusion different from that reached by the trier of fact.” *See Kennedy v. Kennedy*, 688 N.E.2d 1264, 1267 (Ind. Ct. App. 1997), *trans. denied*.

Robert asserts that he should have been awarded custody based on (1) the report and testimony of Dr. Spencer and her recommendation that Robert receive primary custody and (2) the testimony of various witnesses as to what Robert considers Jennie's relative fitness as a parent on topics ranging from her smoking habits to her hygiene to her care for E.E. In citing this evidence, however, Robert misconstrues the role of this Court in its review.

First, Robert places too much emphasis on the opinion of Dr. Spencer. It is well-established that a trial court is not required to accept the opinions of experts regarding child custody. *See, e.g., Clark v. Madden*, 725 N.E.2d 100, 109 (Ind. Ct. App. 2000). Dr. Spencer testified that her evaluation of this family was limited due to the circumstances under which she performed the evaluation, and several of the bases for her opinion that Robert should be awarded primary physical custody were well-rebutted by other testimony calling her observations and Robert's reports to her into question.

Moreover, Robert asks us to commit the same error with Dr. Spencer's testimony that he asks us to commit with all of the other testimony that favors his presentation of the facts; that is, he asks us to reweigh the evidence and judge the credibility of the witnesses. In contrast to the testimony Robert cites, abundant testimony was presented suggesting that Jennie is well-bonded with her child, that she is a more-than-capable caregiver, and that a custody award to Jennie is in the best interests of E.E. It is the trial court, not this tribunal, which is in the best position to weigh conflicting evidence and to judge each witness's credibility. We decline Robert's invitation to usurp that function,

and we therefore find that the evidence is sufficient to support the trial court's determination awarding Jennie custody of E.E.

Affirmed.

BAKER, J., and CRONE, J., concur.